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Damages--Corporations--Corporate Liability for Exemplary Damages

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unless the court liberally applied the sweeping language of *Jones v. Appalachian Electric Power Co.*, *supra*. The principles of the collateral source rule have no application in cases involving breach of contract, *United Protective Workers of America v. Ford Motor Co.*, 223 F.2d 49 (7th Cir. 1955), and seem to be limited to the personal injury field.

Lee O'Hanlon Hill

Damages — Corporations — Corporate Liability for Exemplary Damages

In a wrongful death action against a corporate employer whose servant allegedly operated a motor vehicle in a willful and wanton manner resulting in death of *P's* decedent, the defense of the employer was that punitive damages were not recoverable under Indiana law because the allegations of the complaint, if proven, constituted a statutory violation for which the alleged wrongdoer was subject to criminal prosecution. *Held*, *P's* motion to strike the defense is granted. Under Indiana law, the rule barring exemplary damages, where the acts complained of also constitute an offense for which the wrongdoer could be criminally prosecuted, cannot be successfully raised to protect a corporate employer, which is itself not subject to any criminal prosecution for the acts of its servants. *Bingamen v. Gordon Baking Co.*, 186 F. Supp. 102 (N.D. Ind. 1960).

It appears that the West Virginia court has refrained from discussing the effect of criminal prosecution of the servant on the corporation's liability for exemplary damages. It is to be noted, however, that the West Virginia court has been presented with factual situations wherein the servant could have been subjected to criminal prosecution, but the issue was never raised. *Pendleton v. Norfolk & Western Ry.*, 82 W.Va. 270, 95 S.E. 941 (1918).

The general rule is that a corporation may be held liable for exemplary damages for the wrongful acts of its agents or employees. 19 C.J.S. *Corporations* § 1286 (1940). The courts seem to take two views on the question. By the federal and majority view, a corporation cannot be held for exemplary damages for the torts of its employees or representatives unless (1) it can be shown that

managerial executive agents have participated in some way, or unless (2) the act has been ratified. BALLANTINE, CORPORATIONS § 110 (rev. ed. 1946). The managerial executive agents could have participated in the wrong (a) by ordering the particular conduct of the agent, (b) by issuing general orders which would naturally produce such wrongdoing, or (c) by wanton carelessness in selecting or retaining an unfit servant. MCCORMICK, DAMAGES § 80 (1935). It is seen at once that the majority rule limits very sharply, as a practical matter, the recovery of exemplary damages against corporate employers. MCCORMICK, *supra*.

The minority rule is one of unrestrictive liability. All that is required to impose liability on the corporation is for the employee or agent to be guilty of a wanton or malicious wrong within the scope of his employment. BALLANTINE, *supra*. Thus, the latter view simply applies the rule of respondeat superior to exemplary damages. MCCORMICK, *supra*.

The West Virginia court holdings on a corporation's liability for exemplary damages are in accord with the federal and majority view. In *Downey v. Chesapeake & O. Ry.*, 28 W.Va. 732 (1886), wherein the issue was first presented to the court, the court stated:

"The better and more reasonable doctrine seems to be that the railway company is not to be held liable in exemplary damages for injuries caused by the negligence of its servants, unless it be shown that the servant's act was willful, and was either authorized or ratified by the company. Such authorization or ratification can be evidenced either by an express order to do the act, or an express approval of its commission, or by retention or promotion of the negligent servant."

Ricketts v. Chesapeake & O.R.R., 33 W.Va. 433, 10 S.E. 801 (1890), expanded the liability doctrine set forth in the *Downey* case, *supra*, by holding the company liable in punitive damages if the servant's act was expressly or impliedly authorized or ratified by the company. But, in *Gillingham v. Ohio River R.R.*, 35 W.Va. 588, 14 S.E. 243 (1891), the court, in granting exemplary damages to a passenger who was falsely imprisoned by the conductor in charge of the train, made no mention of the necessity of authorization or ratification. Similarly, *Davis v. Chesapeake & O.R.R.*, 61 W.Va. 246, 56 S.E. 400 (1907), without mentioning authorization or ratification, held that the company was liable for exemplary damages, if the act of the servant is malicious, wanton, willful or reckless. Then, in *Hains v. Parkersburg, Marietta & Interurban Ry.*, 75 W.Va. 613, 84 S.E. 923 (1915), the court said that corp-

orations, other than public carriers, would not be liable for exemplary damages, unless the act was authorized or ratified. Thus, the court has placed a general rule of liability for exemplary damages in actions against public carriers, and a special rule of liability for other corporations. In the *Hains* case, *supra*, the plaintiff was a pedestrian who was struck and injured by the defendant's conductor when the latter threw a heavy tool from the train onto the pavement. The court said that it was essential to show authorization or ratification of the conductor's wrongful act in order to fix liability on the railway company for exemplary damages, since the plaintiff was not suing as a passenger. Thus, even though the carrier is said to be subject to a general rule of liability for exemplary damages, the plaintiff must bring himself within a definite class—i.e., a passenger—before recovery of exemplary damages will be permitted by the West Virginia Supreme Court.

A recent federal case in this state on corporate liability for punitive damages is *Great Atlantic & Pacific Tea Co. v. Lethcoe*, 279 F.2d 948 (4th Cir. 1960). There it was held that, under West Virginia law, the showing of retention by the store manager, who committed the wrongful acts in question, in the employment of the corporate defendant, was insufficient evidence to establish authorization or ratification by defendant. Plaintiff was denied punitive damages. See Comment, 63 W. VA. L. REV. 196 (1961).

In *Pullman Co. v. Hall*, 46 F.2d 399 (4th Cir. 1931), plaintiff, a passenger, brought an action against the carrier for an alleged assault committed on the plaintiff by the carrier's employee. The court held that there must be either authorization or ratification by the carrier to justify the recovery of punitive damages. It appears that, on the facts of this case, the plaintiff would have been able to recover from the carrier, if this action had been pursued in the state court. Since the plaintiff was a passenger, suing a public carrier, his recovery of exemplary damages would not depend upon an authorization or ratification by the carrier.

Although the West Virginia court generally follows the federal rule on corporate liability for exemplary damages, it quite logically has adopted the exception with regard to public carriers. The protection of the traveling public requires that carriers should be held liable for the acts of their servants, to whom they have entrusted the performance of their contracts of carriage.

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